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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 485

HAROLD L. WARNER,

Petitioner,

vs.

FIRST NATIONAL BANK OF MINNEAPOLIS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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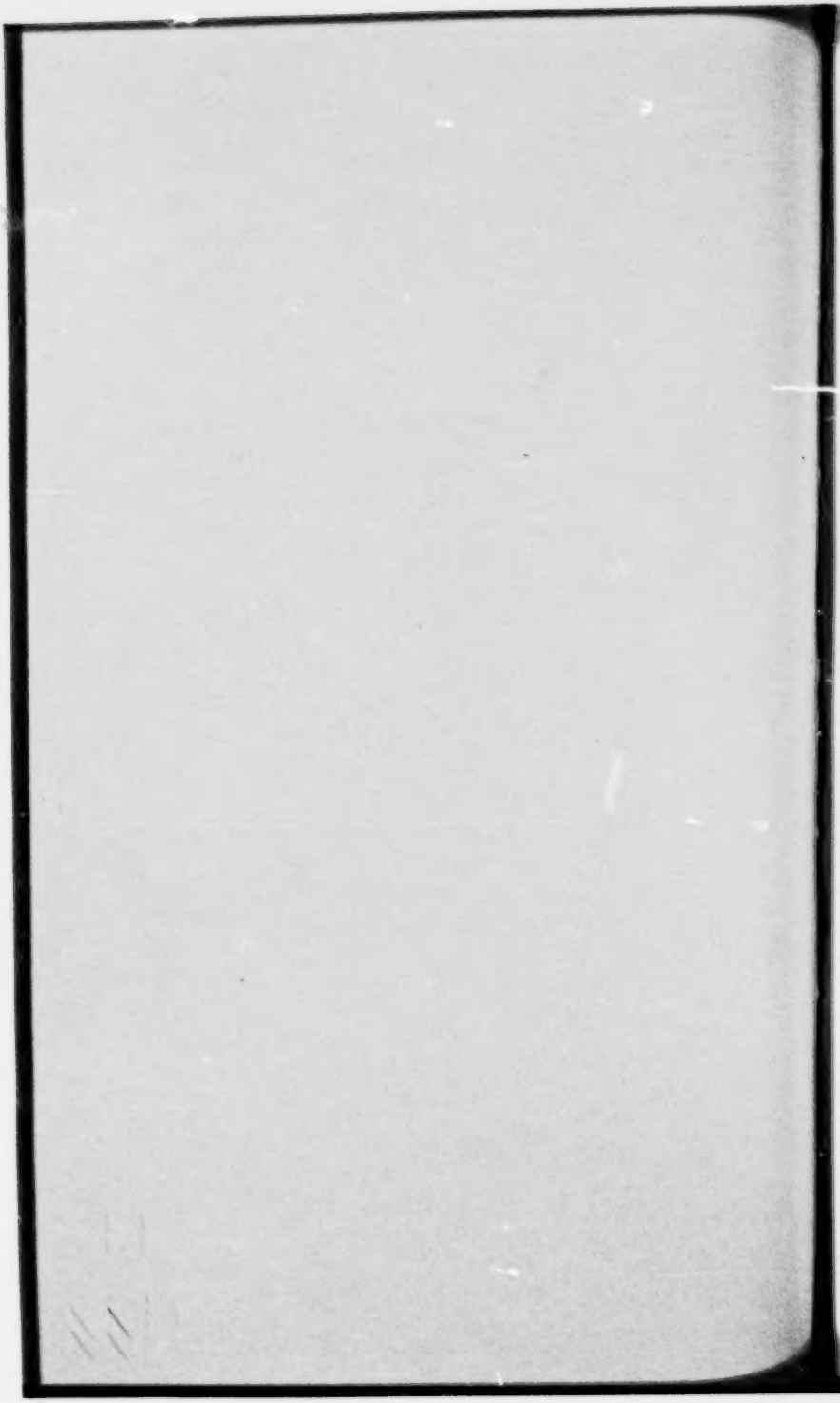

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not yet been reported. A copy of that opinion is appended to the petition for certiorari. The opinion of the District Court (V-2, pp. 224-233[1]) is reported in *Warner v. First National Bank of Minneapolis*, 135 F. Supp. 687 (D. Minn. 1955).

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[1]For consistency this brief follows petitioner's practice of referring to the two volumes of the printed record as "V-1" and "V-2." "Supp. R." refers to the printed supplemental record. The exhibits being forwarded to this Court in original typewritten form will be referred to as "Ex." followed by the exhibit number.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED FOR REVIEW

It is conceded by both parties that the sole issue upon which summary judgment was entered in favor of respondent involved the interpretation and application of the statute of limitations of the State of Minnesota (Appendix A to Petition for Certiorari, p. 32). The questions presented are as follows:

I. Is the decision of the Court of Appeals for the Eighth Circuit applying the Minnesota statute of limitations in conflict on the same matter with decisions of this Court or of other federal courts, none of which other decisions involved the Minnesota statute of limitations? This question properly comprises two subordinate questions.

(A) Is the decision of the Court of Appeals in conflict on the same matter with decisions of other federal courts holding that certain non-Minnesota statutes of limitations were tolled because there was no one in existence to bring an action?

(B) Is the decision of the Court of Appeals applying the Minnesota statute of limitations as the basis for the affirmance of the dismissal of all claims based upon any transactions occurring on or before March 19, 1947, in conflict on the same matter with unidentified decisions of this Court and of various federal courts of appeals holding that concealed fraud tolls statutes of limitations of other jurisdictions?

II. Does the decision of the Court of Appeals applying the Minnesota statute of limitations as the basis for the affirmance of the dismissal of all claims based upon any

transactions occurring on or before March 19, 1947, show that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision?

THE STATUTE INVOLVED

The petition for certiorari seeks to overturn the decisions of the two lower courts applying the Minnesota statute of limitations, the relevant provisions of which are as follows (*Minn. Stat.*, §541.05 (1953)):

> "541.05 *Various Cases, Six Years.* The following actions shall be commenced within six years:
>
> "(1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed;
>
> * * * * *
>
> "(6) For relief on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
>
> "(7) To enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation;
>
> * * * * *"

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Without attempting to correct all the inaccuracies and omissions in the petitioner's statement of the case, we shall set forth only such additional facts as may be necessary to set the questions presented to this Court in the proper perspective.

The petitioner's complaint, filed February 15, 1954, contained some 28 different claims (V-1, *passim*). The action was brought in federal court on the basis of diversity of citizenship (V-1, p. 1). Respondent's motion to dismiss and for summary judgment was addressed to the complaint and each purported claim therein severally considered. The motion, which did not require the determination of any controverted fact issues, was based on five different legal grounds: statute of limitations, lack of indispensable parties, lack of probate jurisdiction, res judicata or estoppel by judgment, and failure to state a claim upon which relief can be granted (V-2, pp. 1-3). The District Court decision granting summary judgment was based on the conclusion that the Minnesota statute of limitations barred recovery (V-2, p. 233; 135 F. Supp. at 693). The Court of Appeals judgment modified the District Court judgment "by excluding from the bar of the statute of limitations claims 6 and 18, and any claims based upon any transaction occurring subsequent to February 15, 1948, or any transaction occurring after March 19, 1947, and not discovered by the beneficiaries until after February 15, 1948" (Appendix B to Petition for Certiorari, p. 44).

The history of the E. C. Warner Estate, upon which the present action is based, is a long history of litigation and charges by this petitioner against the executors and this respondent as Managing Advisor (Supp. R., pp. 1-43; Ex. 1—30-c). During that period there were six appeals to the

Supreme Court of Florida (Supp. R., pp. 24-34). This petitioner also brought one unsuccessful action in the United States District Court for the Southern District of Florida (Supp. R., pp. 25-26; Ex. 20, 20-a), three unsuccessful actions in the Minnesota state courts (Supp. R., pp. 47-50), and one unsuccessful action in the Court of King's Bench, Manitoba (Supp. R., pp. 108-110). In one of his Minnesota actions he appealed unsuccessfully to the Supreme Court of Minnesota (Supp. R., p. 48).

For consideration of the limited questions presented to this Court it is not necessary to summarize the voluminous record facts which demonstrate knowledge by the petitioner of his various claims prior to the statutory period of limitations and which also support the other legal grounds for respondent's motion for summary judgment and for dismissal. In view of the petitioner's insistence, however, one development must be set forth clearly. By the end of 1946 the estate was ready to be closed. On February 6, 1947, the executors filed their "Final Return and Petition for Discharge," and this respondent approved it as Managing Advisor (V-2, pp. 4-11; Ex. 18). On March 19, 1947, petitioner and his wife filed a lengthy Written Defense to that Final Return and Petition for Discharge, which defense asserted most of the same claims and objections now presented in the complaint in the present action (V-2, pp. 12-31; Ex. 18-a). At the hearing on that accounting and on the petitioner's objections thereto the petitioner was represented by counsel, and this respondent bank, in its capacity as Managing Advisor, was represented by counsel (V-2, p. 38; Ex. 18-c). The County Judge's Court of Palm Beach County, Florida, by order dated April 18, 1947, overruled the objections, approved and confirmed the executors' returns, and ordered distribution of the residuary estate (V-2, pp. 36-43; Ex. 18-c).

Although that order was legally the final substantive act of the Florida Court in the administration of the state (*Florida Stat.*, §734.04 (1941)), this petitioner's subsequent actions necessitated the filing of later supplementary returns (Supp. R., pp. 25-35) and delayed the discharge of the executors. The executors were not formally discharged until November 11, 1954 (V-2, pp. 184-186). Thus, at the time the present action was commenced on February 15, 1954, the executors had not been discharged and the respondent was both Managing Advisor and trustee of the residuary trusts.

ARGUMENT

I.

THERE IS NO CONFLICT OF DECISION

A.

The Alleged Conflict Between the Decision of the Court of Appeals and Decisions of Other Federal Courts Holding That the Statutes of Limitations Involved in Such Other Decisions Were Tolled Because There Was No One in Existence to Bring an Action Provides No Basis for the Issuance of Certiorari.

Petitioner argues first that, since the respondent bank was both the Managing Advisor to the executors named in the decedent's will and the trustee of the testamentary trusts created under the will, there was no one in existence to bring this action until the executors were discharged and that, therefore, the statute of limitations was tolled until that time. Petitioner then argues that the writ of certiorari should issue because the decision by the Court of Appeals interpreting and applying the Minnesota statute of limitations is in conflict on that point with (i) a 1941 decision of the Tenth Circuit[2] applying an Oklahoma statute of limitations to a claim by a trustee of one corporation against another corporation in

[2]*Yager v. Liberty Royalties Corporation*, 123 F.2d 44 (10 Cir. 1941).

bankruptcy, (ii) a 1924 decision of the Third Circuit[3] construing the word "accrued" as used in the Federal Employers' Liability Act, (iii) a 1908 decision of the Sixth Circuit[4] construing a Tennessee statute of limitations governing suits to invalidate tax titles to Tennessee real estate, or (iv) an 1873 decision of the Court of Claims[5] construing the word "accrued" as used in a federal statute concerning the jurisdiction of the Court of Claims.

A complete answer to petitioner's argument is this. The sole issue upon which summary judgment in the present case was entered in favor of respondent involved a question of local law, *i.e.*, the interpretation and application of the Minnesota statute of limitations. Accordingly it was the duty of the federal courts to decide the case in conformity with the rulings of the Supreme Court of Minnesota, and any conflict between the decision in the case at bar and decisions of other federal courts in cases not governed by Minnesota law is wholly immaterial. Since the issue upon which the case was decided in the lower courts related solely to the local law of the State of Minnesota, the duty of the District Court and the Court of Appeals to decide that issue in conformity with what would be the probable decision of the Supreme Court of Minnesota if the case had been before that court remains wholly unaffected by what other federal courts may have ruled in other cases not governed by Minnesota law.

Even if it were true (which it is not) that the decisions of the other circuits and the Court of Claims, involving statutes of other jurisdictions, conflicted with the decision in the instant case, that kind of conflict would not provide any basis for the issuance of a writ of certiorari. *Ruhlin v. New*

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[3]*Guinther v. Philadelphia & R. Ry. Co.*, 1 F.2d 85 (3 Cir. 1924).

[4]*Collier v. Goessling*, 160 Fed. 604 (6 Cir. 1908).

[5]*Fulenweider v. United States*, 9 Ct. Cl. 403 (1873).

York Life Insurance Co., 304 U.S. 202 (1938). Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, §331 (2d Ed., Wolfson & Kurland, 1951). In the *Ruhlin* case this Court pointed out that since *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), a writ of certiorari would not be granted where the conflict among circuits arose from the fact that each federal court sitting in a particular state is bound to follow the decisions of the supreme court of that state upon the question in controversy.

The rule of *Erie R. R. Co. v. Tompkins* has been specifically applied to the defense of the statute of limitations. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945), where jurisdiction of the federal court was based solely on diversity of citizenship, this Court held:

> "* * * that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."

It is clear that the statute of limitations would have barred recovery of the instant suit if it had been brought in the state court of Minnesota. Indeed, the petitioner makes no claim to the contrary. The decision of the Supreme Court of Minnesota in *Share v. United States Fidelity & Guaranty Co.*, 199 Minn. 538, 272 N.W. 597 (1937), is precisely in point. It establishes that the decisions of the District Court and the Court of Appeals in this case were a correct interpretation and application of the Minnesota statute of limitations, and that petitioner's argument seeks to bring about an incorrect interpretation of the Minnesota statute. In the *Share* case the complaint charged that an executor had embezzled a trust fund which by the final decree of distribution was directed to be paid to himself as residuary trustee, and that, by false and fraudulent misrepresentations that he had been appointed as trustee and had qualified and had complied with the final decree, the executor had procured from the probate

court an order discharging him as executor and releasing the surety on the executor's bond. The Supreme Court of Minnesota made the following statement concerning the application of the defense of the statute of limitations to those allegations (199 Minn. at 542, 272 N.W. at 599):

> "* * * We think it appears from the allegations of the complaint that Delaney [the executor-trustee] induced the beneficiary to believe that he, Delaney, had been appointed trustee, had qualified, and had received the trust fund from himself as executor, for he, James Lamb [the beneficiary], had received the income therefrom until 1931; being a layman unacquainted with legal proceedings, he did not discover until 1932 the fraud that had been practiced on himself and on the probate court in procuring the order of discharge as executor. Until the discovery of this fraud the statute of limitations did not commence to run against the remedy the beneficiary had of procuring the appointment of a trustee to recover the trust fund from the executor and his surety, the appellant. *It would seem that the cause of action accrued to the beneficiary when the fraud was discovered by him.*" (Emphasis supplied)

The *Share* case presented the exact same fact situation which the petitioner argues exists in the case at bar, since there the executor and testamentary trustee were one and the same person. The Minnesota Supreme Court's statement that the cause of action accrued to the beneficiary when he discovered the alleged fraud is a complete answer to this petitioner's argument. In the instant case the Court of Appeals found from the uncontroverted documentary evidence that the petitioner had knowledge of all the substantial breaches of trust claimed in his present complaint at the time he filed objections to the executors' Final Return and Petition for Discharge, in 1947, more than six years before the present action was commenced (Appendix A to Petition for Certiorari, p. 42).

Finally, petitioner's argument that there was no one in existence to bring this action until the executors were discharged is effectively refuted by the following passage from the opinion of the Court of Appeals (Appendix A to Petition for Certiorari, p. 38):

> "* * * The executors' handling of the estate was fully approved by the 1947 order approving their final accounting. The executors certainly were proper parties to bring an action against the managing advisor in behalf of the estate for any damages caused by breach of duty by the managing advisor. The executors were not finally discharged and released until 1954. They remained in office more than six years after the approval of their final accounting, and during that period the statute of limitations ran in favor of the managing advisor. There is no allegation in the pleadings of any concealment or fraud practiced upon the executors by the managing advisor such as would toll the statute. It would also seem that if plaintiff can properly bring the present action he could have brought the said action within the limitation period. At the time plaintiff commenced this action the executors had not been discharged. The managing advisor in response to plaintiff's complaints repeatedly denied that it had violated any of its duties. Plaintiff had ample reason to believe that the defendant as trustee did not propose to bring any action against itself for breach of its duties as managing advisor. Plaintiff, upon proper showing to the probate court, could have obtained an order requiring the executors to bring the action, or to have an administrator ad litem appointed to represent the estate in the event the executors were interested adversely to the estate. See §732.55, Florida Statutes, 1941."

As the Court of Appeals recognized, (i) this petitioner, with full knowledge of the facts for more than six years before the action was commenced, could have brought the action within the statutory period; (ii) the executors could have brought the action; (iii) the petitioner could have obtained an order from the probate court requiring the executors to bring the

action or appointing an administrator ad litem to represent the estate in the event the executors were interested adversely to the estate.

Accordingly, petitioner's first argument offers no basis for the issuance of the writ of certiorari.

B.

The Alleged Conflict Between the Decision of the Court of Appeals and Unidentified Decisions of This Court and of Various Federal Courts of Appeals Holding That Concealed Fraud Tolls the Statutes of Limitations Involved in Such Other Decisions Provides No Basis for the Issuance of Certiorari.

Petitioner's second argument is that the decision of the Court of Appeals in this case applying the Minnesota statute of limitations as the basis for affirming the dismissal of all claims based upon any transactions occurring on or before March 17, 1947, is in conflict with unidentified decisions of this Court and of various federal courts of appeals concerning fraud and concealment, because the decision in the present case "apparently prevents appropriate amendment to the pleadings, if found necessary, to permit testimony of concealed facts *prior* to March 19, 1947." (Petition for Certiorari, p. 5)

Again, as in the case of the petitioner's first argument, there are two complete answers, one on the law and one on the facts. First, the sole issue upon which summary judgment was granted and affirmed involved a question of local law—the interpretation and application of the Minnesota statute of limitations. Therefore, it was the duty of the federal courts to decide the case in conformity with the rulings of the Minnesota Supreme Court. Any conflict between the decision in the case at bar and decisions of this Court or other courts of appeals in cases not governed by Minnesota law is immaterial.

Second, as in the case of his first argument, petitioner rests his asserted conflict on a misinterpretation of the undisputed facts and of the opinion below. Petitioner claims in this argument that the instant decision conflicts with other federal decisions holding that concealed fraud tolls a statute of limitations. But the Court of Appeals in the case at bar stated:

> "* * * We are convinced, after careful consideration of all of the records before us, that the plaintiff had knowledge of all of the substantial breaches of duties he is claiming in his present complaint at the time he filed his 1947 probate objections. We are therefore convinced that the trial court properly held that all claims based on transactions occurring before the filing of objections of plaintiff to final report on March 19, 1947, were barred by subdivision (1) of section 541.05 of the Minnesota statutes." (Appendix A to Petition for Certiorari, p. 42)

The District Court opinion points out in the footnote (135 F. Supp. 687 at 693, footnote 15; V-2, p. 232):

> "Plaintiff contends that despite his knowledge of the acts complained of for longer than the statutory period, and despite the fact he could have sued earlier, the statute did not commence to run until the estate was closed."

Accordingly, the only truly relevant statement in the only authority cited by petitioner on this point is the following:

> "There can be no concealment which will prevent the running of the statute of limitations, where the cause of action is known, or there is a presumption of knowledge thereof." (*Annot.*, 173 *A.L.R.* 576 at 589 (1948))

It is therefore clear that petitioner's second argument is refuted both on the law and on the facts and affords no basis for the issuance of the writ of certiorari.

II.

THE COURT OF APPEALS DID NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SO FAR SANCTION SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Petitioner's third and final contention is that the action of the Court of Appeals in affirming the dismissal of all claims based upon any transactions occurring on or before March 19, 1947, represents such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

That argument is patently frivolous. It will be remembered that respondent's motion was one for dismissal and for summary judgment. It was presented to the District Court on a voluminous record, including answering affidavits filed on behalf of petitioner, one of which was the affidavit of petitioner himself. Upon a consideration of that record the judgment of dismissal was entered by the trial court and that judgment was in large part affirmed by the Court of Appeals. The extent of petitioner's knowledge of the alleged wrongs, as recognized by the lower courts, is sufficiently dealt with in the preceding section of this brief.

The petition raises no constitutional issue, no question of the interpretation of a federal statute, and no federal question of any kind.

The case has no importance beyond the particular facts and parties involved. There are no other cases dependent on its outcome. Because of the unusual fact situation we cannot envision a like case arising in the future.

In the last analysis the petitioner simply wants a third hearing. The petition presents no more than his dissatisfaction with the interpretation and application of Minnesota law by the District Court for the District of Minnesota and

the Court of Appeals for the Eighth Circuit, the two federal courts best equipped to decide such a question. He seeks a third hearing on that question without making any argument that the decisions of the two lower courts are incorrect interpretations of the Minnesota statute under Minnesota law. In such circumstances, where the petitioner has failed to demonstrate error in the lower court decisions on the local law and has failed to show any conflict between those decisions and decisions of the state supreme court, it is the policy of this Court to leave undisturbed the interpretations of state laws by the lower federal courts whose territories embrace that state. *E.g., Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Estate of Spiegel v. Commissioner*, 335 U.S. 701 (1949); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942).

As we have already pointed out, the petitioner has not asserted or attempted to argue that the decision of the Court of Appeals is incorrect as a matter of Minnesota law. In view of the long line of Minnesota precedents he could not do so. We believe it unnecessary to do more in this brief than to note the principal legal points and Minnesota decisions.[6] We

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[6]Both lower courts held that this action is governed by subdivision (1) of the Minnesota statute of limitations (p. 3, *supra*). Under that subdivision it is clear, as found by both lower courts, that the statute "commences to run from the time of commission of the act complained of." *In re Estate of Burton*, 206 Minn. 516, 289 N.W. 66 (1939). *Jones v. Hammond*, 168 Minn. 131, 209 N.W. 864 (1926).

Petitioner has argued that the action is governed by subdivision (7) of the statute. That argument fails because the Minnesota Supreme Court has consistently held that subdivision (7) "applies only to express, technical and continuing trusts of the kind which were originally cognizable only in a court of equity," and that implied trusts come under subdivision (1). *Jones v. Hammond, supra. Stillwater & St. Paul R. R. Co. v. City of Stillwater*, 66 Minn. 176, 178, 68 N.W. 836, 837 (1896). In the instant case, as the Court of Appeals pointed out, the respondent could not have been trustee of an express trust since in its capacity as Managing Advisor it never had possession of any trust *res*. *Farmers State Bank v. Sig Ellingson & Co.*, 218 Minn. 411, 16 N.W.2d 319 (1944). *Restatement, Trusts*, §74 (1935).

Even if the respondent had had possession of a trust *res* and had been trustee of an express trust so that subdivision (7) controlled, this petitioner could not prevail. As the Court of Appeals found, he "had knowledge of all of the sub-

also respectfully direct the Court's attention to the opinions of the two lower courts and their treatment of the Minnesota decisions.

The petitioner's third argument provides no basis for the issuance of the writ of certiorari.

CONCLUSION

It is respondent's position that all petitioner's claims, except claims 6 and 18, are barred by the statute of limitations; that the record demonstrates full knowledge by petitioner of all claims, other than claims 6 and 18, for more than six years before the present action was begun. For the purpose of this brief only, however, we accept the judgment of the Court of Appeals and refrain from arguing the merits of that court's additional modification of the judgment of the District Court. We also refrain from arguing at this time the other legal grounds advanced in support of respondent's motion for summary judgment and dismissal, including the other legal grounds advanced with respect to claims 6 and 18.

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stantial breaches of duties he is claiming in his present complaint at the time he filed his 1947 probate objections." (Appendix A to Petition for Certiorari, p. 42). In a long line of decisions the Supreme Court of Minnesota has pointed out that the statute commences to run in favor of the trustee of an express trust when the beneficiary acquires knowledge of the alleged breach of trust. *E.g.*, *Wilson v. Welles*, 79 Minn. 53, 56, 81 N.W. 549, 550 (1900). *Shave v. United States Fidelity & Guaranty Co., supra.* Bogert, *Trusts and Trustees*, Vol. 4, Part 2, §951, pp. 202-204 (1935, 1948).

Finally, *Burns v. New Amsterdam Casualty Co.*, 205 Minn. 391, 285 N.W. 885 (1939), conclusively refutes petitioner's argument that the statute of limitations was tolled until the executors were discharged.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: October 31, 1956.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

Conflict in Decisions—Conflicting Claims

Shave Case Not in Point.

We have reviewed the case of *Shave v. U. S. Fidelity & Guaranty Co.*, 199 Minn. 538, 227 N. W. 597, referred to on page 8, et seq., of Respondent's Brief. We can find no facts nor opinion of the court in this case which in any way removes the decision in *Yager v. Liberty Royalties Corporation*, 123 F. 2d 44, from the rule governing the case at bar. It is significant to note that in the *Shave* case the so-called testamentary trustee never qualified in his appointment as such and therefore never occupied a conflicting position with himself as executor of the estate in question.

In fact, the court says, "but such a trustee is not forced to accept the appointment or to receive the trust funds from the executor," and, later, "If Delaney refused to accept the trusteeship, there was none in existence to receive such funds from or collect it of the executor and his surety until this plaintiff was appointed." The question of the running of the statute of limitations, where the same party occupied conflicting positions, as was present in the *Yager* case, was not present in the *Shave* case, and therefore that issue was not passed on by the Supreme Court of the State of Minnesota. In fact, the only point upon which the statute of limitations was applicable in the *Shave* case was the timeliness of the appointment of the trustee to bring the action against Delaney.

We can find no decision in the State of Minnesota where the exact point has been passed on as was raised in the four cases referred to in the petition for writ (pp. 17 and 19 of the petition). We do not believe that there is any such decision by the Supreme Court of Minnesota. Absent such decision, it is not the accepted practice to indulge in any speculation as to what the decision of the Supreme Court would be if presented to it. The only appropriate rule to follow is to follow a rule that has previously been adopted by the federal court in deciding the same issue under similar or comparable circumstances.

It is therefore submitted that respondent has not answered the claims of petitioner that the *Yager* and other cases cited state the applicable rule governing this case.

II.

Departure from Accepted and Usual Course of Judicial Proceedings.

There is a veiled criticism of the petitioner for failure to point out in more detail, by reference to controlling decisions and the facts in the case applicable thereto, on the point of the failure to follow the accepted course of judicial proceedings.

This veiled criticism may be justified. To the end, therefore, that we may render further assistance to this Court in analyzing the case and controlling decisions on the point, we are prompted to point out in more detail the uncertainties resulting from the appellate court's judgment, and how the foreclosure of amendment to the pleadings has resulted also in such departure.

(a) Uncertainties resulting from appellate court judgment.

There are many uncertainties existing with respect to the meaning of the court's decision as incorporated in the last paragraph of its opinion (p. 43) and carried forward into the judgment subsequently entered (p. 44). Unless corrected, these uncertainties will surely result in the same impasse, when the cause is remanded to the district court, as occurred in *Duke Power Company v. Greenwood County, S. C.*, 299 U. S. 259, 57 S. Ct. 202. While it is true that in the *Duke Power Company* case the court ordered the judgment in the district court to be vacated because of intervening facts, the rule is not necessarily limited to the question of whether new facts have intervened since the appeal.

This Court has held in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 58 S. Ct. 860, that a cause should be remanded to the district court "for further pro-

ceedings in conformity with this opinion, with directions to permit such amendment of the pleadings as may be necessary for that purpose." In the *Ruhlin* case there were no new intervening facts.

The rule as announced in the *Duke Power Company* case has been followed as the accepted course of judicial procedure. It is now properly recognized that the proper practice is to vacate the decree in the lower court, thus revesting jurisdiction in that court to permit amendments where justice may require. *City of Centralia, Ill. v. Illinois Power & Light Corporation*, 89 F. 2d 985, 7 C. A., and *Food, Tobacco, Agricultural and Allied Workers Union of America v. Smiley*, 164 F. 2d 922, 3 C. A.

Illustrations of the uncertainties and controversies bound to occur in the case at bar in attempting to carry out the direction of the judgment as modified on appeal are these:

(a) What does the court mean by "transactions occurring after March 19, 1947," with respect to the claim of breach of duty in speculating with the funds of Oldworth Trading Co., Inc., of Canada (V. I, p. 39)? The appellate court modified the judgment of the lower court (without vacating it), to permit testimony relative to recovery of attorneys' fees for action brought in 1949 in Canada to seek information regarding speculation with the Oldworth Company funds (p. 43). (Claim 5 in error referred to as Claim 6 in the opinion (p. 43; see V. I, p. 39).) Obviously, the money paid out to obtain the information which the Circuit Court of Appeals dictates shall remain in the case was to obtain and did obtain information of speculation which had been withheld from plaintiff (Aff., Chaim N. Kushner, V. II, p. 208). The speculation creates just as much liability as the money spent to obtain information concerning it. The speculations occurred from 1943 through the year 1947. The

information concerning them "was discovered by the beneficiary" after February 15, 1948, but the "transactions" with respect to the speculation occurred before March 19, 1947. However, the appellate court says the transactions occurring before March 19, 1947, are barred. The question then arises, Do the "transactions occurring after March 19, 1947," referred to by the appellate court, include the information obtained resulting from the action, and, if so, is the judgment in the district court modified to permit testimony concerning information so obtained and a recovery therefor if a breach of duty is shown thereby? In other words, are the "transactions" to which the appellate court refers applicable to the date of the *happening* of the event, or are they the actions of the plaintiff *obtaining* the information concerning the happening of the event, and thus permit evidence of the events of speculation themselves?

If the "transactions" to which the court refers are the actions of plaintiff's obtaining information of the facts concerning the speculation, then, on the same principle, a substantial number of other claims are open for testimony and recovery. If the transactions are the happening of the events themselves, then, as appears in this instance, by affirming the judgment of the district court the appellate court has evidently foreclosed testimony concerning actionable transactions, information concerning which was withheld, but allows testimony concerning money spent to obtain evidence of them. The question is, What position with respect to this interpretation must the district court take when the case is remanded? Whatever its decision may be, further appeals will undoubtedly follow. Such should not be made necessary. The court says in the *Duke Power Company* case (p. 268):

> "* * * The appropriate action of the appellate court is to vacate the decree which has been entered and

> revest the court below with jurisdiction of the cause to the end that issues may be properly framed and a retrial had."

Now and here is the time and place to make such disposition of the case as "justice requires" *(Patterson v. State of Alabama,* 294 U. S. 600, 55 S. Ct. 575), and remove these uncertainties.

If there is a reasonable probability that the complaint may be amended on remand in respect to matters to permit substantial justice to be done, then the appropriate determination of the appellate court should have been to vacate the entire judgment in the district court and revest that court with jurisdiction to entertain and pass upon the merits after any proposed amendment.

In the district court, and in that court only, such matters may have proper consideration. We submit that the appellate court failed to make its ruling with proper "clarity and definiteness." *Duke Power Company* case, *supra.*

(b) Attention is directed to Claim No. 25 (V. I, p. 140). This has to do with the failure to pay certain annuities due in 1943, 1944, 1945 and 1947, which were not paid until September 3, 1947 and February 19, 1948 (V. I, p. 143), monies for the payment of which were at all times available (V. I, Exhibit B). The pertinent inquiry is, then, Is the failure to pay the annuities on each respective due date the "transactions" to which the appellate court refers, or are the dates of the delayed payment the "transactions" to which the lower court may give consideration after remand?

(c) Attention is directed to Claim 3 (V. I, p. 35). This has to do with the failure to pay annuities required to be paid by the terms of decedent's will. The failure resulted in loss to the residuary trust, the real party in interest here,

of the amount of interest required by the court to be paid to the annuitants because of this delay and which was deducted from the general funds of the estate. The payment of the interest reduced the amount received by the residuary trust. In this instance, are the "transactions" referred to by the appellate court the dates of the respective instances of failure to pay when the annuity was due, or are the "transactions" the loss to the residuary trust ascertained only as at the date of closing of the estate on November 11, 1954, which is well within the statutory period?

(d) An uncertainty will be present in treating Claim 23 (V. I, p. 137) on remand. This has to do with defendant's failure to file amended income tax returns reflecting interest of $118,000 paid to legatees or annuitants and failure to file claims for refunds. Now, are the "transactions" referred to by the appellate court the failure to file the amended returns or the failure to file the claims for refunds? The applicable dates for neither of these are alleged, as it was not deemed necessary under plaintiff's theory of the case. Nevertheless, under the appellate court's ruling, the complaint evidently cannot now be amended even to show those dates, or may they still be shown?

Similar uncertainties exist in many other of the claims, but further and additional illustrations should not be necessary.

One other all-important illustration of uncertainty does appear, however. One prayer for relief consists of the forfeiture of fees of the defendant as Managing Advisor and the extent to which it should be surcharged on fees paid to the executors (V. I, p. 161). Are the "transactions" to which the appellate court refers bearing on this issue restricted to the transactions after February 15, 1948, and those occurring after March 19, 1947, and not discovered by the beneficiaries until after February 15, 1948, even

though the beneficiaries would be foreclosed from recovery on the *actual transactions* happening before that time? A consideration of the over-all picture of the defendant's breaches of duty is material for consideration in passing on the right to relief under the prayer. (See cases cited, footnote p. 10 of petition for writ of certiorari.)

As an illustration of this, it would appear from these authorities that failure to pay interest on deposit of funds has a material bearing on the claim of forfeiture of fees. In view of the appellate court's ruling, will evidence be admissible showing the loss of interest on deposits from January 10, 1942, to December 12, 1948, in the sum of $179,706.34, or will the period be limited to that from March 19, 1947, to December 12, 1948, even though the recovery of the interest itself may be barred?

To what extent, also, will the lower court be prompted to permit testimony of the various other breaches of duty occurring before the dates fixed by the appellate court but on the actual transactions of which recovery is foreclosed? Unless the judgment in the lower court is vacated in its entirety there will be grave uncertainty in the mind of the lower court as to its field of inquiry on this issue. Justice certainly requires that this uncertainty be removed. If it is removed by vacating the judgment in the lower court, then the trial court is free to decide the materiality of testimony offered on the issues. Its ruling in each instance will be governed by the lower court's appraisal of the situation then presented, and its decision will then be open to review on appeal in an orderly manner.

(b) Amendments prohibited.

This is a case where a trial has not been had on the merits. In its present state it is a case where the parties are trying to get the issues properly framed for such trial. No responsive pleading has been filed. The situation lends itself properly to a consideration of amendments to the pleadings with the thought of making disposition of causes expeditiously (*Gibbs v. Emerson,* 31 Fed. Supp. 983). In such instances, liberality of amendments to the pleading is always exercised. The Circuit Court of Appeals, Eighth Circuit, has clearly recognized the rule and given it effect in *National Ladies' Garment Workers Union v. Donnelly Garment Co.,* 121 F. 2d 561. If, therefore, the direction of the appellate court that "the judgment of dismissal on the grounds of the statute of limitations will be affirmed as to all claims based on any transactions on or before March 19, 1947" (p. 43), is sustained in this Court, then evidently the appellate court has foreclosed the district court from entertaining any amendment to the complaint which would put in issue any claims antedating March 19, 1947, even though the district court, upon remand, might be of the opinion that the same cause of action had been adequately pleaded by an amendment (*Ruhlin* case, *supra*).

Since the appellate court has affirmed the judgment of dismissal in the lower court, the appellate court has actually passed on an appropriate amendment to the pleading before the amendment is even offered.

Furthermore, the holding of the appellate court destroys the effect of Rule 15 of the *Rules of Federal Practice and Procedure,* which provides, "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *." An identical rule is effective in *Minnesota Rules of Civil Procedure for the Dis-*

trict Court (Rule 15.01). The point is, What position can the district court take when the cause is remanded? Will the district court say, as in the *Duke Power Company* case, that the judgment in the lower court, not having been vacated in its entirety, the district court could not recognize any amendment permitting a showing of additional facts since amendment to the pleading presupposes the existence of a pending action? On the other hand, absent the direction of the appellate court, the amendments would be allowed as a matter of course.

This plaintiff is placed in a most disadvantageous position. Plaintiff had every reason to believe that the facts in the case as pleaded were such as to remove it from any bar of the statute of limitations, not only by reason of the rule announced in *Yager v. Liberty Royalties Corporation*, 123 F. 2d 44, C. A. 10 (p. 37), but on another theory of the case (p. 35), both of which the appellate court has declined to follow. Even though plaintiff had been inclined to do so, there was no opportunity afforded to the plaintiff to amend the pleadings in the district court in the first instance because it dismissed the action without giving the plaintiff the alternative of amendment (V. II, p. 233). The fitting precedent of the rule in the *Yager* case would destroy any inclination on plaintiff's part to suggest any amendment before appeal. Now, if the rule in the *Yager* case is not followed, plaintiff is without any relief by way of amendment, which relief is designed to meet the requirements of justice, consequently the appellate court has departed from the accepted and usual course of judicial proceedings.

CONCLUSION

This is an important matter. Substantial rights are involved. The right to a respectable amount of money is an issue. The defendant is charged with flagrant violation of *Regulation F of the Federal Reserve Board*. The rule to be followed by future litigants should be clarified. The dilemma which developed in the *Duke Power Company* case should not be permitted to re-occur.

This is a matter in which this Court should exercise its power of supervision and correct what plaintiff believes is an unfortunate miscarriage of justice, if the rule in the *Yager* case is held not to be applicable.

Respectfully submitted,

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